The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; and JAMES S. GORDON JR.

Plaintiffs,

v.

SMARTBARGAINS.COM, LP, a Delaware Limited Partnership;

Defendant.

NO. CV06-1129JCC

SMARTBARGAINS.COM, LP'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO FED. R. CIV. P. 12(b)(6)

NOTE ON MOTION CALENDAR: October 5, 2007

I. INTRODUCTION

Earlier this year, this Court held in Gordon et al. v. Virtumundo et al., Case No. CV06-0204-JCC, W.D.Wash. (Coughenour, J.) ("Virtumundo") that Plaintiffs should be deterred from further litigating their numerous other CAN-SPAM lawsuits now that they are aware of their lack of CAN-SPAM standing. (Virtumundo, Order (Dkt. # 148) at 10:3-4). Virtumundo concerned the same claims as those at issue in this case, brought by the same Plaintiffs with essentially the same complaint. Virtumundo has preclusive effect. Just as this Court held in Virtumundo, in this case Plaintiffs lack standing to sue under

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CAN-SPAM, their CEMA claims are preempted by CAN-SPAM, and their CPA claims cannot survive the dismissal of the CEMA claims.

Also, like Virtumundo, this lawsuit is ill-motivated, unreasonable, and frivolous. (Virtumundo, Order (Dkt. # 148) at 9:21-22). As urged by SmartBargains.com, LP ("SmartBargains") in its Motion to Dismiss for Failure to State A Claim Upon Which Relief Can Be Granted Pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. # 21)(the "Motion"), this Court should give its order in Virtumundo (Virtumundo, Order (Dkt. #121)) (the "Order") preclusive effect in this action, and dismiss Plaintiffs' action.

In the context of this 12(b)(6) motion, Plaintiffs' attempt to have another bite at the apple – by submitting a supporting declaration of James S. Gordon, Jr. (Declaration of James S. Gordon, Jr. (Dkt. # 24) ("Gordon Decl.")), purporting to demonstrate ISP or IAS-specific adverse effect – is misguided. Plaintiffs apparently believe that by introducing supposed "facts" relating to adverse effect, they can not only avoid the preclusive effect of Virtumundo in this action, but also change the outcome of Virtumundo itself. Plaintiffs' belief in this regard is without foundation in law or reason. The issues before the Court are those in the Motion – *i.e.*, whether Plaintiffs' claims are precluded by the Order – not whether the Order was correctly decided. To the extent that Plaintiffs believe that this Court erred in holding that they lacked standing to bring their CAN-SPAM claims, Plaintiffs can appeal the Court's ruling (as indeed they have done). Plaintiffs do not – and cannot – cite to any authority that would allow them to either avoid the preclusive effect of Virtumundo or to change the outcome of Virtumundo by advancing new "facts" in this action. Moreover, Plaintiffs' appeal in Virtumundo has no effect regarding issue preclusion. "Under Washington law, it has been long-established that the pendency of an appeal does not affect the preclusive effect of a judgment rendered at the trial level." Martinez v. Universal Underwriters Ins. Co., 819 F. Supp. 921, 922 (W.D.Wash. 1992). Thus, the Gordon Decl. should be disregarded, the Motion granted, and Plaintiffs' FAC dismissed.

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II. ARGUMENT

A. Plaintiffs' CAN-SPAM claims are precluded.

"Collateral estoppel" or "offensive nonmutual issue preclusion" generally prevents a party from relitigating an issue that the party has litigated and lost. *See* Catholic Social Servs., Inc. v. I.N.S., 232 F.3d 1139, 1152 (9th Cir. 2000). Here, Plaintiffs contend that the doctrine of collateral estoppel does not bar their CAN-SPAM claims because "Plaintiff never had a 'full and fair' opportunity to litigate in Virtumundo the full extent of adverse effect to them." (Opposition at 2:5-7.)[1] Plaintiffs take this position based on their contention that "Plaintiff had no opportunity to argue how it met [this Court's "substantial actual harm"] standard, because the standard was articulated for the first time in the Order granting summary judgment." (Opposition at 6:9-11). Plaintiffs thus submit the Gordon Decl., from which Plaintiffs claim that Plaintiffs can show significant "ISP or IAS-specific burdens [...] if given the opportunity in this case." (Opposition at 23:12-13.) Plaintiffs' contention that they should be allowed to relitigate the "substantial actual harm" issue is disingenuous, and the Gordon Decl. is nothing more than hearsay, mendacity, and bluster.

Plaintiffs' claim that they had no way of knowing that they would be required to show "ISP or IAS-specific burdens" in Virtumundo simply does not support the conclusion that Plaintiffs did not have a full and fair opportunity to litigate the issue of CAN-SPAM standing. Plaintiffs were repeatedly asked to identify *any* burdens they had suffered as a result of defendants' e-mails, whether such burdens were ISP or IAS-specific or not. "ISP or IAS-specific burdens" are obviously a subset of burdens in general, which Plaintiffs failed to establish. (*See* (Virtumundo, Deposition of James S. Gordon, Jr., attached to the Declaration of Derek A. Newman in Support of Defendants'

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[1] Plaintiffs also contend that they did not have a "'full and fair opportunity' to litigate the adverse effects they have suffered by receiving spam in general" (Opposition at 2:19-20) (emphasis in original) but provide no authority which would impose liability on SmartBargains for emails sent by any other party.

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Motion for Summary Judgment ("Newman Decl.") (Dkt # 101) at 319-321) ("Q: you suffered actual damages; is that right? A: No, that's not true"; "Q: My question is whether you suffered actual damages. Did you? A: We've not enumerated any actual damages."; Q: Did you suffer any actual damages? A: I don't have anything to add.").

Having failed to establish any ISP or IAS-specific burden, or any burden at all, in Virtumundo, Plaintiffs now seek to establish that "Plaintiff has been forced to upgrade his servers as a result of spam, he has been forced to install additional software, and all of this came at great expense to a small Internet Access Service operated by an individual." (Opposition at 6:15-18.) Even if these allegations were true and supported by the evidence, they would be beside the point; the Motion concerns only the preclusive effect of the Order. Plaintiffs' contention that Virtumundo was wrongly decided is not properly advanced in this action.

Moreover, although the Gordon Decl. includes a few receipts for expenses, those expenses are insubstantial and indistinguishable from expenses incurred by typical users. Plaintiffs' expenses are limited to "purchas[ing] a new business computer along with a second business computer" over two years ago, paying an increased monthly service fee, electing to pay for additional support services from his ISP, and purchasing an assortment of hardware and software. (Gordon Decl. at ¶¶ 5,6.) Occasional hardware and software purchases are exactly the kinds of costs faced by typical consumers and do not rise to the level of "adverse effects" to an Internet access service. Alternatively, if Plaintiffs are an Internet access service as they claim to be, it is no surprise that they have technology expenses. What is surprising is that a purportedly *bona fide* Internet access service spends so little on hardware and software. Those insignificant costs are irrelevant in either case because Mr. Gordon does not allege that he incurred the above expenses as a result of email sent by SmartBargains. Plaintiffs' enumeration of these consumer-related costs in this case are nothing more than an attempt to relitigate the issue of standing that has already been fully litigated and decided by this Court in Virtumundo. As discussed

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above, in Virtumundo Gordon was asked to disclose any damages he suffered as a result of receiving commercial email and disclosed nothing. (Newman Decl. at 319-321) (*See also* Order at 121:18-19) ("[Plaintiffs] have alleged absolutely no financial hardship or expense due to e-mails they received").

In any event, Plaintiffs' CAN-SPAM claims meet the Ninth Circuit's test for offensive nonmutual issue preclusion. Plaintiffs had a full and fair opportunity to litigate the issue of CAN-SPAM standing, and the Court's Order in Virtumundo has a preclusive effect in this lawsuit.[2]

B. Plaintiffs' CEMA and CPA claims are both precluded and preempted.

Plaintiffs claim that their CEMA and CPA claims are not precluded because "the 'adverse effect' of e-mails sent by Virtumundo is not the same as the 'adverse effect' of an entirely different set of e-mails sent by Smartbargains." (Opposition at 5:17-19.) Plaintiff's argument is unpersuasive; the e-mails themselves do not need to be litigated, because this Court has enough information to determine that the Plaintiffs' CEMA and CPA claims are subject to the same preemption analysis as the e-mails at issue in Virtumundo. More specifically, this Court has already ruled that claims arising under CEMA and CPA for allegedly misleading headers are preempted unless the errors prevent the recipient of the e-mail from identifying the sender. (Virtumundo, Order (Dkt. #121) at 20:4-6). That holding has preclusive effect in this action. It is apparent from the face of the FAC that Plaintiff's claims in this action similarly concern immaterial, hyper-technical "errors" that do not rise to the level of deception or fraud required to escape preemption. Although plaintiffs allege that Defendant's emails include "header information that is materially false or materially misleading," the examples they provide - "IP address and host name information do not match, or are missing or false, in the 'from' and 'by' tokens in the Received header field; and dates and times of transmission are

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[2] As noted in the Motion, Plaintiffs' appeal has no effect regarding issue preclusion. Judicial economy supports dismissing this action, rather than merely staying it.

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deleted or obscured" - would not prevent ready identification of the sender and are not material. (FAC (Dkt. #4) ¶ 13.) As such, they are preempted by CAN-SPAM.

Additionally, Plaintiffs proffer a novel interpretation of CEMA which would prohibit the "misrepresentation of the sending computer's identity" and impose liability for the alteration of a single character in an email's header information. (Opposition at 11) (emphasis in original). However, a plain reading of the statute reveals that no such prohibition exists and Plaintiffs offer no authority to support their interpretation. To the contrary, in Virtumundo this Court rejected similar hyper-technical bases for liability and held that claims for immaterial errors or misrepresentations were preempted by CAN-SPAM and not actionable under CEMA. (Order at 19.) Likewise, Plaintiffs' CPA claims fail because their CEMA claims are both precluded and preempted.

C. Plaintiffs already had a full and fair opportunity in Virtumundo to litigate whether they suffered adverse effects.

In their Opposition to the Motion (Dkt. #23) (the "Opposition") Plaintiffs contend that (1) "Plaintiffs did not have a 'full and fair' opportunity to litigate in Virtumundo the full extent of adverse effect to them" (Opposition at 2:5-7); (2) "Plaintiffs have not had a 'full and fair' opportunity to litigate the adverse effects they have suffered by receiving spam in general" (Opposition at 2:19-20); (3) this Court should apply novel interpretations of CAN-SPAM and CEMA that Plaintiffs failed to raise in Virtumundo (Opposition at 2:15-17); and (4) "The Court's ruling in Virtumundo that Plaintiff[s] failed to show adverse effect from one set of e-mails does not mean that Plaintiff[s] should be denied an opportunity to be heard and to show adverse effect from a different set of emails (Opposition at 4:7-10).

Plaintiffs' contentions lack merit. This Court expressly found that Plaintiffs did *not* suffer an adverse impact as required by the CAN-SPAM Act (Order at 13:13-15) ("[t]herefore, because they cannot show 'adverse effect,' it is irrelevant whether Plaintiffs are a true IAS.") This Court's decision was based on a fully-developed factual record, in

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which Plaintiffs were repeatedly requested to identify any actual damages they had suffered, and repeatedly failed to do so. *See* Order at 13:17-19 ("Plaintiffs undisputedly have suffered no harm related to bandwidth, hardware, Internet connectivity, network integrity, overhead costs, fees, staffing, or equipment costs, and they have alleged absolutely no financial hardship or expense due to e-mails they received from Defendants.")

D. The FAC should be dismissed for failure to state a claim upon which relief can be granted because Plaintiffs did not allege material violations.

Plaintiffs have filed essentially identical boilerplate complaints in action after action. Like other defendants sued by Plaintiffs, SmartBargains can learn from the FAC that it is being sued for alleged violations of CAN-SPAM, CEMA, and the CPA. The FAC offers no clue, however, as to which specific provisions of those statutes are alleged to have been violated, or by which e-mails. Plaintiffs' FAC merely parrots the elements of the statutes purportedly at issue. This is precisely the kind of pleading that the Supreme Court recently disapproved in Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007) ("a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true."). Here, Plaintiff has failed to allege any facts which would amount to a material violation of CAN-SPAM or CEMA. As such, the FAC does not meet the pleading standard established by Rule 8, and the Court should dismiss this case.

III. CONCLUSION

Virtumundo concerned the same claims as those at issue in this case, brought by the same Plaintiffs. Plaintiffs lost Virtumundo, as they must lose the instant action. First, Virtumundo has preclusive effect. As it did in Virtumundo, this Court should find that Plaintiffs lack standing to sue under CAN-SPAM, that Plaintiffs' CEMA claims are preempted by CAN-SPAM, and that Plaintiffs' CPA claims cannot survive the dismissal

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of Plaintiffs' CEMA claims. Additionally, Plaintiffs do not allege material violations of the statutes and thus fail to properly state a claim. Accordingly, SmartBargains respectfully requests the Court dismiss this action and all claims alleged herein.

DATED this 5th day of October, 2007.

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